Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Nevada State Cable Television Association,	)	File No. PA 96-001
Complainant	)	
	)	
v.	)	
Nevada Bell,	)	
Respondent/Petitioner	)	

ORDER ON RECONSIDERATION

Adopted: August 6, 2002 **Released: August 8, 2002**

By the Chief, Enforcement Bureau:[1]

1. In this Order, we deny a petition for reconsideration ("Petition") of Cable Services Bureau Order, DA 98-1175 ("Bureau Order").[2] The Bureau Order granted a pole attachment complaint filed by Nevada State Cable Television Association ("NSCTA") against Nevada Bell, pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")[3] and Subpart J of Part 1 of the Commission's rules.[4] In the Bureau Order, the Cable Services Bureau found Nevada Bell's pole attachment rates to be unjust and unreasonable and calculated a just and reasonable pole attachment rate. NSCTA filed an Opposition and Nevada Bell filed a Reply. We affirm the Bureau Order.

2. Pursuant to the Pole Attachment Act, the Commission has the authority to regulate the rates, terms, and conditions for attachments by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.[5] The Pole Attachment Act grants the Commission general authority to regulate such rates, terms and conditions, except where such matters are regulated by a State.[6] The Commission is authorized and has adopted procedures necessary to resolve complaints concerning such rates, terms, and conditions.[7] The

[1] Effective March 25, 2002, the Commission transferred responsibility for resolving pole attachment complaints from the former Cable Services Bureau to the Enforcement Bureau. *See Establishment of the Media Bureau, the Wireline Competition Bureau and the Consumer and Governmental Affairs Bureau, Reorganization of the International Bureau and Other Organizational Changes*, FCC 02-10, 17 FCC Rcd 4672 (2002).

[2] *Nevada State Cable Television Association v. Nevada Bell*, PA 96-001, DA 98-1175, 13 FCC Rcd 16774 (CSB 1998).

[3] 47 U.S.C. § 224.

[4] 47 C.F.R. §§1.1401-1.1418.

[5] 47 U.S.C. § 224 (b) (1).

[6] 47 U.S.C. § 224 (b) and (c). Nevada has not certified that it regulates rates, terms and conditions of pole attachments. *See Public Notice*, "*States That Have Certified That They Regulate Pole Attachments*," 7 FCC Rcd 1498 (1992).

[7] 47 U.S.C. § 224 (b)(1).

Commission has developed a formula methodology to determine maximum allowable pole attachment rates to ensure that such rates are just and reasonable.[8] A utility may not charge more than the maximum amount permitted by the formulas developed by the Commission. The Commission has concluded that "where onerous terms or conditions are found to exist on the basis of the evidence, a cable company may be entitled to a rate adjustment or the term or condition may be invalidated."[9]

3. In its Petition, Nevada Bell raises two issues concerning the Cable Services Bureau's calculation of Nevada Bell's maximum permitted rate. First, Petitioner asserts that the Bureau Order "failed to explain how the rate it adopted applies to jointly owned as opposed to solely owned poles".[10] Nevada Bell claims that, because the poles in issue were jointly owned with another utility ("electric utility"), the electric utility is entitled to charge a separate rental fee based on the Common Carrier Bureau's decisions in *Continental Cablevision*[11] and *Teleprompter Corporation*.[12] Nevada Bell argues that the Cable Services Bureau should have set a maximum rate that allowed Nevada Bell to be compensated for the electric utility's costs in addition to Nevada Bell's costs. NSCTA responds that Nevada Bell is not entitled to collect a pole attachment rate on behalf of the electric utility, citing Nevada Bell's Joint Pole Agreement with the electric utility, which states that Nevada Bell may retain any rental fees from attachments in the communications space of the jointly owned poles.[13]

4. The record does not support Nevada Bell's argument. As NSCTA points out, Nevada Bell's Joint Pole Agreement with the electric utility states that Nevada Bell may retain any rental fees from attachments in the communications space of the jointly owned poles. Indeed, in its Response to the Complaint, Nevada Bell stated that it did not propose to set a pole attachment rate for the electric utility.[14] There is no evidence in the record, which includes the pole attachment agreements between NSCTA's members and Nevada Bell, that supports Nevada Bell's claim that it is collecting pole attachment fees on behalf of the electric utility.

5. In fact, the issue of joint ownership was considered by the Cable Services Bureau ("Bureau") in its calculation of the maximum rate Nevada Bell was entitled to charge. The Bureau

[8] *See Adoption of Rules for the Regulation of Cable Television Pole Attachments, First Report and Order*, 68 F.C.C. 2d 1585 (1978); *Second Report and Order*, 72 F.C.C. 2d 59 (1979); *Memorandum and Order*, 77 F.C.C. 2d 187 (1980), *aff'd, Monongahela Power Co. v. FCC*, 655 F.2d 1254 (D.C. Cir. 1985) (*per curiam*); and *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 (1987). *See also, Implementation of Section 703(e) of the Telecommunications Act of 1996*, 13 FCC Rcd 6777 (1998) and *Amendment of Rules and Policies Governing Pole Attachments*, 15 FCC Rcd 6453 (2000), *pet. for recon. denied in part, Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98; *Implementation of Section 703(e) of the Telecommunications Act of 1996*, FCC 01-170, 16 FCC Rcd 12103 (2001), *appeal pending sub nom. Southern Company Services, Inc. et al. v. FCC*, Case No. 01-1326 (D.C. Cir., filed July 26, 2001).

[9] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles, Memorandum Order and Opinion on Reconsideration*, 4 FCC Rcd 468, 471 at ¶ 26 (1989).

[10] Petition at p. 1.

[11] *Continental Cablevision of New Hampshire, Inc. v. Concord Electric Company*, PA 82-0074, Mimeo No. 5536, 1985 FCC Lexis 3023 (CCB 1985).

[12] *Teleprompter Corporation v. New England Telephone and Telegraph Company, et al*., PA 79-0044, Mimeo No. 002016 (CCB, released July 14, 1981).

[13] *See* Joint Pole Agreement, Complaint Exhibit E at Section VIII.

[14] Response at p. 8, n. 4.

accepted Nevada Bell's proposed number of equivalent poles as the total pole count to be used in the formula.[15] Because an equivalent pole count was used in the rate calculation, Nevada Bell is able to recover its fully allocated costs associated with the pole attachments, in accordance with the Pole Attachment Act. In the Bureau Order, the Bureau determined that Nevada Bell may charge a maximum per pole attachment rate of $1.26 for poles for which Nevada Bell's ownership interest is 100 percent. To the extent Nevada Bell seeks to clarify that it may collect only a proportionate amount of the maximum $1.26 rate per pole, based on its ownership interest percentage, we clarify as follows: For solely owned poles, the maximum attachment rate is $1.26; for jointly owned poles in which Nevada Bell owns a 50 percent interest, the maximum attachment rate is $0.63; and for jointly owned poles in which Nevada Bell owns a 40 percent interest, the maximum attachment rate is $0.50.[16] Because Nevada Bell used an equivalent pole count in calculating the rate per pole, Nevada Bell will fully recover its costs despite the reduction in rate for the jointly owned poles.[17]

6. Nevada Bell's reliance on *Continental Cablevision* and *Teleprompter Corporation* to support its claim for additional fees is misplaced. In *Continental Cablevision*, the Common Carrier Bureau merely noted that the utility could only collect its portion of the maximum rate based on its ownership percentage.[18] Although the Common Carrier Bureau stated that it was possibility that a joint owner could collect a separate rental fee for its share of the poles, in the instant case, no other entity is sharing in the fees and Nevada Bell may not collect an additional fee on such entity's behalf. Likewise, in *Teleprompter Corporation*, the Common Carrier Bureau did calculate rates based on the separate costs of the individual utilities. Unlike this case, however, in *Teleprompter Corporation* both utilities were parties to the case and both utilities separately collected pole attachment fees. The Bureau Order is consistent with both of these decisions. Based on the record evidence, we affirm the Cable Services Bureau conclusion that Nevada Bell is not entitled to receive an additional fee over its maximum permitted rate.

7. Nevada Bell's second issue concerns the Cable Services Bureau's decision not to depart from its standard formula, which relies on publicly filed and verifiable data, to allow Nevada Bell to substitute an internally generated number in the formula for pole investment accumulated deferred taxes ("Pole ADT"), rather than using a prorated number calculated from the publicly available and independently verifiable data reported to ARMIS.[19] Nevada Bell argues that the internally generated figure is more accurate because the Cable Services Bureau used a pole investment related accumulated depreciation ("Pole AD") figure in its calculation and the two numbers are linked. Nevada Bell argues that this is the type of inconsistency frowned on by the court in *Alabama Power*.[20] Nevada Bell argues

[15] In determining the cost of a bare pole, an element of the pole attachment formula, the pole investment is divided by the total number of poles owned or controlled by the utility. The total number of poles must be adjusted to the total number of equivalent poles if some of the utility's poles are jointly owned by another entity. The number of equivalent poles equals the number of solely owned poles plus the sum of the products of the numbers of jointly owned poles times their ownership percentages. For example, if a utility owns 100 percent of 10 poles and 50 percent of 20 poles, that utility owns 20 equivalent poles. Where, as here, both parties to the proceeding stipulate to the number of equivalent poles, the staff does not inquire further about the number of jointly owned poles.

[16] *See* Joint Pole Agreement, Complaint Exhibit E at Section X.

[17] *E.g.*, if a utility owns 20 poles and 50 percent of 20 additional poles, its equivalent pole count is 30. Assuming its total net pole investment and carrying charges are $300.00, the per pole rate is $10.00. If it collects for an attachment on every pole, it will collect 20 x $10.00 and 20 x $5.00 = $300.00 for a full recovery.

[18] *Continental Cablevision* at n. 11.

[19] Automated Reporting and Management Information System.

[20] *Alabama Power Company v. Federal Communications Commission*, 773 F.2d 362 (D.C. Cir. 1985).

that the Pole Attachment Act requires the use of actual figures and a prorated figure is not an actual figure. Nevada Bell argues that the proration method, although applied by the Common Carrier Bureau in *American Cablesystems*[21] and *TCA Management*,[22] is not an established part of the pole attachment formula.

8. NSCTA responds that Nevada Bell should not be able to pick and choose specific internal accounts to substitute in the formula when it results in a lower rate calculation. NSCTA argues that selective use of internal accounts results in an "unbalancing" of the formula. NSCTA also argues that reliance on internal records significantly increases the likelihood of factual disputes and reduces an attacher's ability to calculate the maximum rate using publicly available information. NSCTA explains that using internal accounts would result in a more complicated formula but would not be any more accurate than relying on publicly available information. NSCTA argues that Nevada Bell misconstrues *Alabama Power*, which did not in fact disapprove of using proration as a methodology for allocating costs. NSCTA also disagrees with Nevada Bell's contention that the Common Carrier Bureau's restatement of the pole attachment formula in *American Cablesystems*[23] and *TCA Management*[24] has no precedential value for this case.

9. To determine a just and reasonable pole attachment rate, Congress directed the Commission to institute an expeditious program "which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation."[25] To that end, Congress noted that although there may be some difficulty in determining the components of the operating expenses and actual capital costs of the utility, special accounting measures or studies should not be necessary since the majority of the cost and expense items attributable to the utility pole plant are already established and reported to various regulatory bodies and therefore the information is already a matter of public record.[26] The Commission has stated, "we expect to continue to use a methodology which utilizes publicly available data, does not require ratemaking proceedings, and lends itself to an expeditious resolution of disputes. It is our intent to conform to the will of Congress and to avoid protracted proceedings, special studies, or submissions of internal corporate data to the maximum extent possible."[27]

10. The Commission has expressed a preference for using publicly available data to calculate the maximum pole attachment rate.[28] In *Television Cable Service, Inc. v. Monongahela Power Co.*,[29] the

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[21] *American Cablesystems of Florida, Ltd., et al. v. Florida Power & Light Company* and *TCA Management Co. v. Southwestern Public Service Co.*, PA 91-0012, 10 FCC Rcd 10934 (CCB 1995).

[22] *TCA Management Co., et al., v. Southwestern Public Service Company*, PA 90-0002, 10 FCC Rcd 11832 (CCB 1995).

[23] *American Cablesystems of Florida, Ltd., et al. v. Florida Power & Light Company* and *TCA Management Co. v. Southwestern Public Service Co.*, PA 91-0012, 10 FCC Rcd 10934 (CCB 1995).

[24] *TCA Management Co., et al., v. Southwestern Public Service Company*, PA 90-0002, 10 FCC Rcd 11832 (CCB 1995).

[25] *See S. Rep. No*. 95-580, 95th Cong., 1st Sess. at 21 (1977).

[26] *Id.* at 19-20.

[27] *Notice of Proposed Rulemaking, Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles,* CC Dkt. No. 86-212, FCC 86-274 (*released* June 6, 1986).

[28] *See Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 at ¶¶ 37, 47, and 52 (1987).

[29] *Television Cable Services, Inc. v. Monongahela Power Co.*, 88 F.C.C. 2d 63 (CCB 1981), *modified in part*, FCC 81-488, 88 F.C.C. 2d 56 (1981).

Commission expressed its preference for "data developed for regulatory purposes."[30] Nevertheless, we do not require that only publicly available data be used. The provisions in the rules requiring utilities to provide data to attachers anticipate that some data may be available only from the utility. However, in complaint proceedings, where the Commission may take notice of information in publicly available filings made by the parties, it is our practice "in the absence of supported carrying charges . . . to use the figure from publicly available information."[31]

11. For regulatory purposes, utilities depreciate equipment over its estimated useful life using straight line depreciation.[32] For tax purposes, however, a utility might claim higher depreciation expense in the early years of the service life of an asset and lower depreciation in later years, through accelerated depreciation and investment tax credits.[33] This results in lower tax payments with respect to the early years which are offset by increased tax payments in later years. The amount of income taxes deferred through the use of accelerated depreciation is recorded for accounting purposes in an accumulated deferred tax reserve and represents funds provided for capital investment. The majority of regulatory commissions which follow tax normalization practice deduct the depreciation related deferred income taxes from the utility's rate base, to prevent the utility from earning a return on the portion of its investment financed by the reserve.[34]

12. The Commission has stated that "[i]t is essential that a uniform method for the normalization of taxes be utilized to permit interested parties to independently verify, from publicly available data, the reasonableness of a utility's procedure for determining the tax component of the carrying charge. Consistent with our goal of utilizing a simple and predictable approach, we have chosen formulas which are both reasonable and straight-forward. . . . We have also determined that our application of tax normalization should include an adjustment to reflect the state regulatory commissions' treatment of accumulated deferred tax reserve. . . . If the state regulatory commission treats deferred taxes as a rate base deduction the formula for determining pole attachment rates should include a deduction of the accumulated tax reserve from the utility's pole investment."[35] Therefore, consistent with the appropriate state commission's treatment of the accumulated deferred tax reserve, when determining the net cost of a bare pole, we reduce the utility's pole investment by subtracting accumulated depreciation and accumulated deferred taxes to prevent the utility from earning a return on the accumulated deferred tax reserve.[36]

13. The pole attachment formula requires the use of proration in several contexts. For example, when calculating the administrative portion of the carrying charges, we divide the total plant administrative expenses by the net plant investment, which results in a percentage reflecting the ratio of total administrative expenses to net plant investment. We then apply that percentage to the net pole investment, in essence,

[30] *Id.* at ¶ 20.

[31] *Teleprompter v. C&P of West Virginia*, FCC 80-372, 79 F.C.C. 2d 232 at ¶ 17 (1980). *See also Texas Cable and Telecommunications Association v. GTE Southwest Incorporated*, DA 99-348, 14 FCC Rcd 2975 at ¶¶ 26-29 (CSB 1999).

[32] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, 2 FCC Rcd 4387 at ¶¶ 45-52 (1987).

[33] *Id.*

[34] *Id.*

[35] *Id.* at ¶ 52.

[36] *Id.*

prorating the administrative charges from net plant investment to net pole investment to yield a reasonable estimate of the administrative expenses related to poles. This methodology was approved by the court in *Alabama Power*.[37] In order to determine net plant investment, we subtract the plant related accumulated deferred taxes ("Plant ADT") and plant related accumulated depreciation ("Plant AD") from the gross plant investment. Likewise, we determine net pole investment by subtracting the Pole ADT and Pole AD from the gross pole investment. When applying the pole attachment formula to electric utilities, we generally prorate both the Pole AD and the Pole ADT, using publicly available information about the Plant AD and the Plant ADT. We divide the gross pole investment by the gross plant investment and multiply that figure by the Plant AD and Plant ADT to determine what portion of the Plant AD and Plant ADT is reasonably related to gross pole investment. For telephone utilities, we prorate the Pole ADT but not the Pole AD because the Pole AD figure is available in the ARMIS report. Because we have a more accurate, publicly available and verifiable figure, we use that in the formula.

14. Nevada Bell would like to substitute an internally generated negative number for its Pole ADT figure in the formula. When subtracted from Nevada Bell's gross pole investment, this would actually increase the net cost of a bare pole and increase the pole attachment rate. If we were to accept Nevada Bell's proposal, we would be required to inquire and investigate why Nevada Bell has a negative Pole ADT. Although Nevada Bell provides a spread sheet that totals negative $1,060,000, Nevada Bell offers no detailed explanation of its spread sheet and no reconciliation with the Plant ADT figure available in the ARMIS report, which is a positive figure. While Nevada Bell does offer a general explanation of how it obtained a negative Pole ADT, it provides no specific details that would help clarify this anomaly or explain how this negative number is reflected in its gross pole investment.

15. Nevada Bell does raise an interesting point concerning the relationship of the Pole AD and Pole ADT figures. However, rather than arguing that we use a prorated Pole AD figure, as we would use with an electric utility, instead of the more accurate Pole AD figure as reported in ARMIS, Nevada Bell rejects this argument out of hand.[38] In addition, although we agree with NSCTA that use of the internal Pole ADT figure might affect or require additional adjustments to other formula calculations,[39] just as any change in one input to the formula will affect the overall pole attachment rate, our goal is to use the most simple, expeditious and accurate formula that will result in a maximum just and reasonable rate. Therefore, the Commission has concluded that the more accurate Pole ADT figure may be used in the formula, once that figure is publicly reported in ARMIS.[40] Additional issues relating to the telephone utilities' regulatory accounting reporting requirements can be addressed as they arise.[41] For purposes of this case, however, we affirm the Bureau Order. Nevada Bell has not provided sufficient information or explanation to support its use of an internally generated report.

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[37] 773 F.2d at 369-370.

[38] Petition at p. 7.

[39] *See, e.g.*, Comments of SBC Communications, Inc. at pp. 19-22 (filed June 27, 1997) and Reply Comments of National Cable Television Association , et al. at pp. 33-34 (filed August 11, 1997) in CS Docket No. 97-98, concerning the administrative carrying charge calculation.

[40] *See Amendment of Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98; *Implementation of Section 703(e) of the Telecommunications Act of 1996*, FCC 01-170, 16 FCC Rcd 12103 at ¶ 104 (2001), *appeal pending sub nom. Southern Company Services, Inc. et al. v. FCC*, Case No. 01-1326 (D.C. Cir., filed July 26, 2001).

[41] *See, e.g.*, discussion concerning when net pole investment is zero or negative, *id.* at ¶¶ 26-42.

16. Accordingly, IT IS ORDERED, pursuant to Sections 0.111, 0.311 and 1.106 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311 and 1.106, that the petition for reconsideration of *Nevada State Cable Television Association v. Nevada Bell,* PA 96-001, DA 98-1175, 13 FCC Rcd 16774 (CSB 1998), IS DENIED.

17. IT IS FURTHER ORDERED, pursuant to Sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111 and 0.311, that *Nevada State Cable Television Association v. Nevada Bell,* PA 96-001, DA 98-1175, 13 FCC Rcd 16774 (1998), IS CLARIFIED TO THE EXTENT INDICATED HEREIN.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau